IN THE

Supreme Court of the United States

October Term, 1949

No. 25

ELMER W. HENDERSON, *Appellant*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SOUTHERN RAILWAY COMPANY, *Appellees*.

BRIEF FOR SOUTHERN RAILWAY COMPANY

SIDNEY S. ALDERMAN,
ARTHUR J. DIXON,
CHARLES CLARK,
Attorneys for Appellee,
Southern Railway Company.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OPINIONS BELOW

The opinion of the specially constituted three-judge United States District Court, for the District of Maryland, in Number 3829, Henderson v. United States of America, et al., appears in the Record at pages 248-260 and is reported 80 F. Supp. 32. The decree entered thereon October 28, 1948, appears at page 265 of the Record.

The report of the Interstate Commerce Commission, which gave rise to the proceedings in the District Court, appears at pages 4-11 of the Record, and is reported 269

I.C.C. 73, Elmer W. Henderson v. Southern Railway Company, September 5, 1947.

Prior to those decisions of the Interstate Commerce Commission and the District Court, the case had been heard before the Commission and by the District Court as follows:

No. 2455, Henderson v. United States, et al., 63 F. Supp. 906, December 17, 1945, Record pages 63-79; and

Henderson v. Southern Railway Company, 258 I.C.C. 413, May 13, 1944, Record pages 184-195.

A chronological history of this litigation is submitted herewith as Appendix A, page 39.

JURISDICTION

This is a direct appeal authorized under the Act approved June 25, 1948, effective September 1, 1948, Title 28, U. S. Code, Section 1253.

The suit was brought in the District Court under the provisions of 28 U.S.C., Sections 41(28), 43-48, 792, and 49 U.S.C. Section 17(9). Similar provisions under the Act of June 25, 1948: 28 U.S.C., Sections 1336, 1398, 2284, 2321-2325, 49 U.S.C., Section 17(9).

THE STATUTES INVOLVED

Interstate Commerce Act, Part I, 49 U.S.C., Section 3(1) forbidding undue or unreasonable preference or advantage.

Civil Rights Act, 8 U.S.C., Sections 41 and 43.

Constitution of the United States, Article IV, Section 2, clause 1.

Statutes above submitted herewith as Appendix B, pages 40-41.

STATEMENT OF THE CASE

The order (R.4-12) of the Interstate Commerce Commission, sustained by the decree of the District Court (R.265) dismissing appellant's suit, grew out of the following facts:

On May 17, 1942, appellant, a Negro citizen of the United

States, was a passenger on a Southern Railway train leaving Washington, D. C., at 2:00 P.M. en route to Atlanta, Ga. Soon after the first call for dinner, he went to the dining car. White passengers were seated at the tables reserved for Negro passengers. The dining car steward refused to seat appellant at one of the vacant seats in that part of the diner reserved for white passengers. The steward offered to serve appellant at his seat in the Pullman car; he refused to be served there. About 7:00 P.M., appellant returned to the dining car, with the same result. The steward told him to return to his seat in the Pullman car and that he would be sent for as soon as a seat at one of the tables reserved for Negro passengers was available. The steward failed to send for appellant. He was never served. The diner was removed from the train at Greensboro, N. C., about 9:00 P.M. Appellant was the only Negro passenger seeking dining-car service on that trip.

On October 10, 1942, appellant filed a complaint with the Interstate Commerce Commission. He alleged that the steward's action in refusing to serve him unjustly discriminated against him. He prayed an order be entered to require the defendant railway to desist from the alleged discrimination, and in the future to establish and enforce for Negro passengers equal and just dining car facilities. He asked for damages because of the alleged discrimination. He charged violations of Section 3(1) of the Interstate Commerce Act (49 U.S.C. Section 3(1)), the Civil Rights Act (8 U.S.C. Sections 41 and 43) and the Immunities Clause of the Federal Constitution (Article IV, Section 2, Clause 1).

Defendant Railway showed that travel on the train in question was unusually heavy. Travel generally had greatly increased incident to the war. Dining-car facilities were crowded. All passengers, who desired dining-car service, could not be served before the diner reached the end of its run at Greensboro, N. C. The Railway also showed its rules in respect of segregation of white and Negro passengers in dining cars. The rule of July 3, 1941, in effect at the time

of this incident, provided that white and Negro passengers would be served in diners at separate times. If a passenger of one race desired a meal while passengers of the other were being served, such meal would be served in the room or seat occupied by the passenger without extra charge. That if the dining car is equipped with curtains, to divide it into separate compartments, meals might be served to passengers of different races at the same time in their respective compartments. That rule is submitted herewith as Appendix C, page 42.

Before the case came on for hearing before the Interstate Commerce Commission, February 24, 1943, the Railway amended its rule (Appendix D, page 42). The amended rule of August 6, 1942, provided that before starting each meal the steward would draw the curtains in position thus separating the two end tables from the other tables in the diner. He would place a "reserved" card on each of the two tables, one seating four diners and the other seating two. These tables were not to be used for white passengers until seats at other tables in the diner had been taken. Then if no Negro passengers had presented themselves, the curtains might be pushed back, card removed and white passengers served at those tables. And further if after the tables were so occupied by white passengers, should Negroes present themselves, they should be advised that they would be served just as soon as those tables were vacated.

The Interstate Commerce Commission by Division 2 in its report of May 13, 1944 (R.184-195) recited the facts in considerable detail and set out the railway's rule and the amended rule in respect of race separation in dining cars. It found that the steward could have consummated his understanding with appellant by not allowing any other white passengers to be seated at the end tables and thus could have seated and served appellant. Thereupon the Commission determined that appellant had been subjected to undue and unreasonable prejudice and disadvantage, or, broadly stated, discriminated against in violation of Section 3(1)

of the Interstate Commerce Act, but found that he had not been damaged and denied the prayer for damages.

On the facts of record, including the amended rule of defendant railway, the Commission found that substantial equality of treatment was provided in keeping with the decisions of this Court. (*Chiles* v. *Chesapeake & O. Ry.*, 218 U.S. 71 (1910), and *Mitchell* v. *U. S.*, 313 U.S. 80 (1941)). It thereupon determined that no useful purpose would be served by the entry of an order for the future with respect to the rule and dismissed the complaint. *Henderson* v. *Southern Rwy. Company*, 258 ICC 413 (R. 184-195).

Appellant sued in the District Court to set aside the Commission's order. He charged violations of Section 3(1) of the Interstate Commerce Act, of the Civil Rights Act and Federal Constitution (Appendix B, pages 40-41).

The three-judge District Court held that race segregation is not *per se* an abridgement of any constitutional right. The Court said it did not question the authority of the Commission to approve segregation of white and colored passengers by the reservation of particular tables. Upon examining the amended rule, it determined that the rule as amended August 6, 1942, did not provide equality of treatment in that while the majority of the tables were set aside for the exclusive use of white passengers, none was set aside exclusively for Negro passengers. The Court set aside the Commission's order and remanded the case to the Commission for further proceedings in the light of the principles announced by the Court. *Henderson* v. *United States*, 63 F. Supp. 906 (R.63-79).

The case was reheard before the Commission and the further amended rule of the defendant railway introduced, submitted herewith as Appendix E. This rule, effective March 1, 1946, specifically provided for a division of the space in diners for the use of white and colored* passengers.

*Subsequently reference in the rule to "colored" passengers has been changed to read "Negro" passengers. (R. 37.)

The four-seated table at the buffet end of the dining space was set aside for the exclusive use of Negro passengers and the other tables in the diner were set aside for the exclusive use of white passengers. The partition curtain separating this end table from the next table on the same side of the aisle must be drawn and must so remain drawn for the duration of the meal; a "reserved" card to be placed on the table and kept in place at all times during the meal hour, except when such table is occupied by Negro passengers.

The Railway showed that as its dining cars are shopped for repairs, a permanent partition about five feet in height is being substituted for the curtain and the space across the aisle from the four-seated table (set aside exclusively for Negro passengers) is being equipped for the steward's locker and cash register.

Based on a check made by defendant, on its heaviest traveled line, of meals served to white and Negro passengers, it was found that the four-seated table represents slightly more than 8 per cent of the seating capacity in each dining car reserved unconditionally for the use of 4 per cent of the patrons. The Commission so found and, confirming its prior findings, held that the amended dining-car regulations of the railway were not shown to be in violation of Section 3, or any other provision of the Interstate Commerce Act, and dismissed the complaint. *Henderson* v. *Southern Rwy. Company*, 269 ICC 73 (R. 4-11).

Appellant again sued in the District Court for the District of Maryland to set aside this second order of the Commission. He alleged, as before, the violation of the Interstate Commerce Act, Civil Rights Act, and the Federal Constitution.

After hearing, the three-judge District Court upheld the further order of the Interstate Commerce Commission by holding that segregation is not forbidden under the Federal Constitution, the Interstate Commerce Act or any other Act of Congress, as long as there is no real inequality of

treatment of those of different races and found no inequality under the railway's rule. Opinion by District Judge Coleman, District Judge Chestnut concurring, Circuit Judge Soper dissenting. The decree of the Court dismissed the complaint from which final judgment appeal is taken to this Court. *Henderson v. United States,* 80 F. Supp. 32 (R. 248-260).

The railway's rules charge the train conductor with overall control of the train. Submitted herewith as Appendix F, page 44.

ANALYSIS OF DECISIONS BELOW

The opinion of the court below, Sept. 25, 1948, conveniently summarizes the facts from the report of the Commission and the prior decision of the District Court. After briefly stating the facts, which are not in dispute, it was said of the prior decision:

> "On appeal to this Court to set aside the action of the Commission, we held (Henderson v. United States, D.C., 63 F. Supp. 906) that while racial segregation of interstate passengers is not per se forbidden either by the Federal Constitution, the Interstate Commerce Act or any other Act of Congress, the Commission, nevertheless, erred in holding that the Southern Railway's general practice, as evidenced by its then current dining car regulations or instructions, would result in no substantial inequality of treatment between Negro and other passengers seeking dining car service." (R.250).

The flaw in the Railway's rule of August 6, 1942, then before the Court was pointed out in this statement:

> "* * * and while the great majority of the tables are set aside for the exclusive use of white passengers, none is set aside exclusively for Negro passengers." (R.250).

The analogy of the *Mitchell* case (313 U.S. 80, 96, 97) was noted. The provision for serving a Negro passenger at his

seat in the Pullman or coach in lieu of the diner when the table for Negroes was occupied by white passengers was condemned as readily as the railroads' practice in the *Mitchell* case of alloting space to Negro passengers in drawing rooms or compartments only when available. Then Judge Coleman followed with this statement:

> "'While the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused.'" (R. 251).

and again:

> "With respect to the requirement in the Southern Railway's then current dining car regulations that tables for Negro passengers be curtained, we found that this did not violate the rule of substantial racial equality, and stated that the method of carrying out the principle of racial segregation on interstate carriers was a matter for the Commission to determine." (R.252).

The order of the Commission was set aside because there was no provision in the railway's rule for dining space for the exclusive use of Negroes.

The Court set out the amended rule effective March 1st, 1946 (Appendix E). It provided that one table seating four persons "shall be reserved exclusively for colored passengers, and the other tables in the diner shall be reserved exclusively for white passengers"; and further:

> "Before starting each meal, draw the partition curtain separating the table in Station No. 1, described above, from the table on that side of the aisle in Station No. 2, the curtain to remain so drawn for the duration of the meal."

The Commission reopened the case, approved its prior findings, and found the new regulations (Rule March 1st, 1946) "were not in violation of Section 3, or any other pro-

vision of the Interstate Commerce Act" and dismissed the complaint. (R.4-12).

Judge Coleman then said:

> "The case is before us on the testimony presented to the Commission. The correctness of its factual analysis of this testimony as contained in its report is not questioned. Thus, it will be seen that the Railway's amended dining car regulations, contrary to the prior regulations, require the setting aside of a table, seating four persons, exclusively for the use of Negro passengers. Also, the uncontradicted evidence presented to the Commission shows that up to the date of the Commission's deci ion, the number of Negro passengers seeking dining car service rarely if ever exceeded that number on any one trip. Should that happen, however, the situation would be no different from those instances not infrequently occurring in interstate railroad transportation, where more white passengers seek dining car service than can be seated at one time. In short, the new regulations, the Commission found, are designed to take into account, with all due regard to the density of Negro travel requiring dining car service, the probability that a Negro passenger may not desire a meal as soon as he boards the train, or that he may board the train at an intermediate point after the dining car service has been begun, and may desire at that time or later to be served in the dining car." (R.255-256).

and:

> "We are satisfied, without further quoting from or analyzing the report of the Commission, that the inequality which we found to exist in the Railway Company's earlier dining car regulations, as respects the facilities afforded white and Negro passengers, has been removed by the Railway's amended regulations. We also believe there is no sound basis for treating the matter of fixed partitions between the tables differently from our treatment of the use of curtains. The same applies also to the location of the table allotted to colored passengers. We do not find that the Commission has permitted the Railroad to create an unjust discrimination by allotting to such passengers a table at the

kitchen end of the dining car, directly opposite the space newly provided for the steward's office. The undesirability of this location compared with that of tables in other parts of the dining car, from the point of view of noise, heat, etc., as alleged by plaintiff, is, we think, nonexistent. Therefore, it necessarily follows that this present complaint must be dismissed unless the Supreme Court has, in some decision or decisions rendered since the date of our earlier decision, extended the principles which it had previously announced with respect to the matter of equality of treatment of the races when engaged in interstate transportation." (R.256-257).

Judge Coleman turned to two decisions of this Court subsequent to the prior decision of the District Court, *Morgan* v. *Virginia*, 328 U.S. 373 (1946) and *Bob-Lo Excursion Co.* v. *Michigan*, 333 U.S. 28 (1948).

As to the first (328 U.S. 373) he said:

"That the Supreme Court in the Morgan case very definitely recognized the distinction between the two types of cases, namely, those involving the validity of a State statute and those involving the rule of a carrier requiring segregation of interstate passengers, is indicated by the following footnote, 328 U.S. on page 377, 66 S. Ct. on page 1053: 'When passing upon the (a) rule of a carrier that required segregation of an interstate passenger, this Court said, "And we must keep in mind that we are not dealing with the law of a state attempting a regulation of interstate commerce beyond its power to make." Chiles v. Chesapeake & Ohio R. Co., 218 U.S. 71, 75, 30 S.Ct. 667, 668, 54 L.Ed. 936, 20 Ann. Cas. 980.' See also Simmons v. Atlantic Greyhound Corporation, D.C. (W.D.Va.), 75 F. Supp. 166; Stamps v. Louisville & Nashville Railroad Co., 269 I.C.C. 789." (R. 258).

As to the second (333 U.S. 28) he said:

"In its opinion in the Bob-Lo Excursion Company case, the Supreme Court distinguished Morgan v. Virginia, supra, and Hall v. Decuir, 95 U.S. 485, 24 L.Ed. 547, saying (333 U.S. 28, at pages 39, 40, 68 S. Ct. 358,

at page 364): 'The regulation of traffic along the Mississippi River, such as the Hall case comprehended and of interstate motor carriage of passengers by common carriers like that in the Morgan case, are not factually comparable to this regulation of appellant's highly localized business, and those decisions are not relevant here.'" (R.259).

Judge Coleman did not overlook the recent "Covenant" cases

> "* * * prohibiting sales of realty to Negroes, Shelley v. Kraemer (McGhee v. Sipes), 334 U.S. 1, 68 S.Ct. 836; and Hurd v. Hodge (Urciolo v. Hodge), 334 U.S. 24, 68 S.Ct. 847, obviously have no relation, directly or indirectly, to the issue in the present case. Those decisions do not hold that race segregation in respect to deed covenants is forbidden. On the contrary, they recognize the legality of agreements to this effect. They merely hold that such agreements, although lawful, are not enforceable by court process. Thus, they have no relation to the principles governing the conduct of interstate transportation by common carrier." (R.259).

and summarizing said:

> "... (1) Racial segregation of interstate passengers is not forbidden by any provision of the Federal Constitution, the Interstate Commerce Act or any other Act of Congress as long as there is no real inequality of treatment of those of different races. (2) Allotment of seats in interstate dining cars does not per se spell such inequality as long as such allotment, accompanied by equality of meal service is made and is kept proportionately fair. This necessity was recognized by the Commission in its report on which the order now approved by us is based, when it said (269 I.C.C. 73, at page 76): 'Should the indicated trend continue, substantial equality of treatment may require the reservation of additional accommodations for Negroes in the future.' To the argument that proportionate allotment of tables is only just and equitable so long as persons may find seats at a table assigned to their respective races, and

fails to meet the equality test when there is any empty seat in the dining car which a person of either race is forbidden to occupy, suffice it to say that this argument denies the very premise from which we start, namely, that racial segregation is not, per se, unconstitutional. Since this is true, we fail to see that a situation such as that just referred to produces a result any more unjust or inequitable from a legal approach,—which must be this Court's approach to the question,—than the no doubt common situation where both white and colored passengers may be kept waiting to secure seats at tables allotted to their respective races, because, for the time being, every seat in the dining car may be occupied.

"For the reasons herein set forth the complaint must be dismissed." (R. 260).

THE QUESTION PRESENTED FOR DECISION

The appeal brings to this Court for decision the question whether racial segregation of interstate passengers is forbidden by any provision of the Federal Constitution, the Interstate Commerce Act or any other Act of Congress, so long as there is equality of treatment of those of different races. The question arises under the rule of the Railway whereby the space in its dining cars is divided: one portion for the exclusive use of Negro passengers and the remaining part for the exclusive use of white passengers. It is the operation of the rule of the Railway that gives rise to the question for decision; not the segregation statute of the State of Virginia in which state the incident here in question occurred.

SUMMARY OF ARGUMENT

The case at bar is ruled by decisions of this Court:

Hall v. *DeCuir*, 95 U.S. 485 (1877).
Plessy v. *Ferguson*, 163 U.S. 537 (1896).
Chiles v. *Chesapeake & O. Ry.*, 218 U.S. 71 (1910).
Morgan v. *Virginia*, 328 U.S. 373 (1946).

Segregation with equal treatment to both races is supported by decisions of this Court in the "School" and other cases:

"School" cases:

Missouri Ex Rel. Gaines v. *Canada*, 305 U. S. 337 (1938).
Sipuel v. *Board of Regents*, 332 U.S. 631 (1948).
Fisher v. *Hurst*, 333 U.S. 147 (1948).
Sweatt v. *Painter* (Court of Civil Appeals, Austin), 210 S. W. (2d) 442 (1948), note at p. 444.

"Passenger Train" cases:

McCabe v. *A. T. & S. F. Ry. Co.*, 235 U.S. 151 (1914).
Mitchell v. *U. S.*, 313 U.S. 80 (1941).
Chiles v. *Chesapeake & O. Ry.*, 218 U.S. 71 (1910).

"Municipal Street" cases:

Cox v. *New Hampshire*, 312 U.S. 569 (1941).

The lower Federal Courts are currently upholding segregation rules of common carriers of passengers:

Day v. *Atlantic Greyhound Corporation*, 171 F. (2d) 59 (C.C.A. 4, 1948).
Simmons v. *Atlantic Greyhound Corp.*, 75 F. Supp. 166 (W.D.Va., 1947).
Solomon v. *Pennsylvania R. Co.*, 79 F. Supp. 449 (S.D. N.Y., 1948).

Interstate Commerce Commission has sanctioned regulations of carriers requiring separation of white and Negro passengers with equal treatment of each:

Councill v. *Western & Atlantic R.R. Co.*, 1 I.C.C. 339 (1887). 1 Inters. Com. Rep. 638 (1887).
Mays v. *Southern Railway Company*, 268 I.C.C. 352 (1947).

Stamps and Powell v. *Louisville & N. R. Co.*, 269 I.C.C. 789 (1948).
Heard v. *Georgia Railroad Company*, 1 I.C.C. 428, 1 Inters. Com. Rep. 719 (1888).
Heard v. *Georgia Railroad Company*, 3 I.C.C. 111, 2 Inters. Com. Rep. 508 (1889).
Edwards v. *N. C. & St. L. Ry.*, 12 I.C.C. 247 (1907).
Evans v. *C. & O. Ry. Co.*, 92 I.C.C. 713 (1924).
Crosby v. *St. L.-S. F. Ry. Co.*, 112 I.C.C. 239 (1926).

The long continued and uniform practice of the Interstate Commerce Commission in construing and applying Section 3(1) of the Act is entitled to great weight:

Logan v. Davis, 233 U.S. 613, 627 (1914).
Kern River Co. v. *United States*, 257 U.S. 147 (1921).
Swendig v. *Washington Water Power Co.*, 265 U.S. 322, 331 (1924).
United States v. *Minnesota*, 270 U.S. 181, 205 (1926).
Wisconsin v. *Illinois*, 278 U.S. 367, 413 (1929).

Safety and comfort of passengers and good order on trains prompts separation of the races.

The railway's rule accords white and Negro passengers equal treatment in dining cars.

ARGUMENT

The Case at Bar is Ruled by Decisions of this Court

Hall v. *DeCuir*, 95 U.S. 485 (1877). DeCuir, a Negro woman, took passage from New Orleans, La., to Hermitage, La., on a river steamer operating from New Orleans, La., to Vicksburg, Miss. The Master of the steamer refused to admit DeCuir to a cabin set aside for white persons. A statute of Louisiana recognized the right of common carriers of passengers to refuse admittance of persons to their vehicles provided such rules made no discrimination on account of race or color and the statute gave a right of action to

recover damages for violation of the proviso. Judgment in DeCuir's favor was affirmed in the State Supreme Court, but reversed in this Court. In the opinion Mr. Justice Waite said (p. 488):

> "* * * we think it may safely be said that State legislation which seeks to impose a direct burden upon inter-state commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position."

and added (p. 489):

> "* * * No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by State lines, has been invested with the exclusive legislative power of determining what such regulations shall be."

From the foregoing it will be clearly seen that while the decision in the *DeCuir* case struck down the State statute as a burden upon interstate commerce, the over-all direct effect of the decision was to uphold the rule of the steamer whereunder the Master, Benton, refused a Negro passenger access to the cabin set aside exclusively for white passengers. That the steamer's rule was thus upheld is made clear by the following statement (p. 490):

> "* * * As was said by Mr. Justice Field, speaking for the court in *Welton* v. *The State of Missouri*, 91 U.S. 282, 'inaction (by Congress) . . . is equivalent to a declaration that inter-state commerce shall remain free and untrammelled.' Applying that principle to the circumstances of this case, congressional inaction left Benson (the master) at liberty to adopt such reasonable rules

and regulations for the disposition of passengers upon his boat, while pursuing her voyage within Louisiana or without, as seemed to him most for the interest of all concerned."

In *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), another statute of Louisiana was before the Court. It declared that Railways shall provide equal but separate accommodations for white and colored races, and further that a passenger failing to observe the segregation requirement might be fined or imprisoned. Plessy was a passenger between two stations within the state of Louisiana. He insisted upon occupying a seat in the coach set aside to accommodate white passengers. He was ejected and imprisoned. The Supreme Court of Louisiana affirmed his conviction. *Ex parte Plessy*, 45 La. Ann. 80. On writ of error to this Court the constitutionality of the State Act was attacked upon the ground that it was in conflict with the Fourteenth Amendment which prohibits certain restrictive legislation on the part of the States. This Court affirmed in an opinion by Mr. Justice Brown holding that the enforced separation of the races as applied to the internal commerce of the State neither abridges the privileges or immunities of the colored man, deprives him of his property without due process, nor denies him the equal protection of the laws within the meaning of the Fourteenth Amendment. In that connection, Mr. Justice Brown said (pp. 544, 550, 551):

> "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the

exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced."

"So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."

"* * * If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. As was said by the Court of Appeals of New York in *People* v. *Gallagher*, 93 N. Y. 438, 448, 'this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the functions respecting social advantages with which it is endowed.'"

Chiles v. *Chesapeake & Ohio Railway*, 218 U.S. 71 (1910). Chiles, a colored passenger on the C. & O. Railway, was traveling from Washington, D. C., to Lexington, Ky. At Ashland, Ky., he had to change to another train. Upon boarding it he went into a car which "under the rules and regulations of defendant in error, was set apart exclusively for white persons. From this car he was required to remove to a car set apart exclusively for the transportation of colored persons." He sued in the State Court for damages; judgment on a jury verdict for the defendant was affirmed by the Ken-

tucky Court of Appeals. In an opinion delivered by Mr. Justice McKenna this Court affirmed, from which opinion we quote (p. 74):

> "* * * The complaint of the action of the court rests upon the contention that, as against an interstate passenger, the regulation of the company in providing different cars for the white and colored races is void. There is a statute of Kentucky which requires railroad companies to furnish separate coaches for white and colored passengers, but the Court of Appeals of the State put the statute out of consideration, declaring that it had no application to interstate trains, and defendant in error does not rest its defense upon that statute, but upon its rules and regulations. Plaintiff in error makes some effort to keep the statute in the case, and says that the trial court, by its ruling upon testimony and by its instructions, confined 'the jury only to the lesser motive' of defendant's 'wrongful act.' In other words, as we understand plaintiff in error, confined the jury to the consideration of the regulations of the railroad company and withdrew from its consideration the effect of the statute under which, it is said, the conductor declared he acted. But by this we understand plaintiff in error to illustrate that his rights as an interstate passenger were denied. We are, therefore, brought back to the question what his rights as such passenger were.
>
> "The elements of that question have been considered and passed on in a number of cases. And we must keep in mind that we are not dealing with the law of a State attempting a regulation of interstate commerce beyond its power to make. We are dealing with the act of a private person, to wit, the railroad company, and the distinction between state and interstate commerce we think is unimportant."

In reaching its conclusion to affirm, the opinion cited and quoted with approval from *Hall* v. *DeCuir*, (95 U.S. 485), and *Plessy* v. *Ferguson*, (163 U.S. 540), adding:

> "* * * Regulations which are induced by the general sentiment of the community for whom they are made

and upon whom they operate, cannot be said to be unreasonable. See also *Chesapeake & Ohio Ry. Company* v. *Kentucky*, 179 U.S. 388."

Morgan v. *Virginia*, 328 U.S. 373 (1946). Irene Morgan was a Negro interstate passenger on a common carrier bus in Virginia. The State statute required passenger motor vehicle carriers, both interstate and intrastate, to separate, without discrimination, white and colored passengers. Upon her refusal to accede to the request of the driver of the bus to remove to a back seat in the vehicle, partly occupied by other colored passengers, so as to permit the seat vacated to be used by a white passenger, she was arrested and convicted of violating the Virginia statute. Her conviction was affirmed by the Supreme Court of Appeals of Virginia, 184 Va. 24. On appeal, this Court reversed in an opinion by Mr. Justice Reed holding that the Virginia statute was an undue burden on interstate commerce. In reaching this conclusion, he said (p. 381):

"On appellant's journey, this statute required that she sit in designated seats in Virginia. Changes in seat designation might be made 'at any time' during the journey when 'necessary or proper for the comfort and convenience of passengers.' This occurred in this instance. Upon such change of designation, the statute authorizes the operator of the vehicle to require, as he did here, 'any passenger to change his or her seat as it may be necessary or proper.' An interstate passenger must if necessary repeatedly shift seats while moving in Virginia to meet the seating requirements of the changing passenger group. On arrival at the District of Columbia line, the appellant would have had freedom to occupy any available seat and so to the end of her journey."

The decision on this appeal did not turn on any rule of the motor common carrier; on the contrary Mr. Justice Reed was careful to point out in a footnote at page 377:

"When passing upon a rule of a carrier that required segregation of an interstate passenger, this Court said,

'And we must keep in mind that we are not dealing with the law of a State attempting a regulation of interstate commerce beyond its power to make.' *Chiles* v. *Chesapeake & Ohio R. Co.*, 218 U.S. 71, 75."

It is not amiss to stress the fact here that Mr. Justice Reed referred to *Hall* v. *DeCuir*, 95 U.S. 485, and the soundness of this Court's decision therein (p. 383) and quoted at great length therefrom in a footnote at page 384.

From the foregoing it will be seen that the decisions of this Court from 1877 to 1946 have uniformly upheld the principle of segregation of white and Negro passengers in common carrier vehicles, equality of treatment being accorded both races, under appropriate rules of the common carriers.

Segregation, With Equal Treatment To Both Races, Is Supported by Decisions of this Court in the "School" and Other Cases.

The rule announced by this Court in dealing with rules and regulations of common carriers of passengers just discussed is supported by the decisions of this Court in what may be termed "The School Cases." In the leading case of *Missouri Ex Rel. Gaines* v. *Canada*, 305 U.S. 337 (1938), it appeared that the State of Missouri maintained a university for white students, and another, known as Lincoln University, for the higher education of Negroes. The point was made that Lincoln University had no law school in connection therewith, whereas the State University did have a law school for white students. Gaines, a Negro, was refused admission to the law school at the State University, the state authorities answering that he might have law instruction at the law schools of one of the neighboring states such as that maintained in Kansas for Negroes. This answer of the state authorities was rejected in this Court for lack of equality of treatment by the state in dealing with the two races. At page 349, Mr. Chief Justice Hughes said:

"* * * The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State."

And, at page 351, the Chief Justice quoted from *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U.S. 151, in part, as follows:

"* * * Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor, but, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused."

The two most recent cases follow the *Gaines case*:

Sipuel v. *Board of Regents*, 332 U.S. 631 (1948).
Fisher v. *Hurst*, 333 U.S. 147 (1948).

Mr. Chief Justice McClendon of the Court of Civil Appeals of Texas, (Austin), in *Sweatt* v. *Painter* (1948), 210 S.W. (2d) 442, dealt with a so-called "School" case. At pages 443-444 he said:

"At the outset it should be borne in mind that the validity of state laws which require segregation of races in state supported schools, as being, on the ground of segregation alone, a denial of due process, is not now an open question. The ultimate repository of authority to construe the Federal Constitution is the Federal Supreme Court. We cite chronologically, in a note below, the unbroken line of decisions of that tribunal recognizing or upholding the validity of such segregation as against such attack.*

"The gist of these decisions is embodied in the following excerpts from the opinion in Plessy v. Ferguson (Mr. Justice Brown writing):

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* *Hall* v. *DeCuir*, 1878, 95 U.S. 485, 24 L. Ed. 547; *Plessy* v. *Ferguson*, 1896, 163 U.S. 537, 16 S.Ct. 1138, 1140, 41 L. Ed. 256; *Cumming* v. *County Board of Education*, 1899, 175 U.S. 528, 20 S.Ct. 197, 44 L. Ed. 262; *McCabe* v. *A. T. & S. F. R. Co.*, 1914, 235 U.S. 151, 35 S.Ct. 69, 59 L. Ed. 169; *Gong Lum* v. *Rice*, 1927, 275 U.S. 78, 48 S.Ct. 91, 72 L. Ed. 172; *Missouri* v. *Canada*, 1938, 305 U.S. 337, 59 S.Ct. 232, 83 L. Ed 208; *Sipuel* v. *Oklahoma*, 1948, 68 S.Ct. 299, 92 L. Ed. 247.

'The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.' "

Segregation, with equal treatment, on passenger trains is supported by:

McCabe v. *Atchison, T. & S. F. Ry. Co.*, 235 U.S. 151 (1914).

Mitchell v. *U. S.*, 313 U.S. 80 (1941).

And we submit the broad question finds support in *Cox* v. *New Hampshire*, 312 U.S. 569 (1941). In that decision Chief Justice Hughes dealt with "civil liberties" invoked in the case at bar by appellant. We quote the Chief Justice at page 574:

"* * * The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend."

We pause to say that the civil rights, 8 U.S.C. Sections 41 and 43, (Appendix B), appellant seeks to inject into the case at bar relate to action by a State; not to rules of common carriers of passengers.

The Lower Federal Courts Are Currently Upholding Segregation Rules of Common Carriers of Passengers.

Day v. *Atlantic Greyhound Corporation*, 171 F. (2d) 59 (C.C.A. 4, 1948), wherein Circuit Judge Soper, who delivered the opinion of the Court, specifically cited and relied upon *Hall* v. *DeCuir*, 95 U.S. 485, *Chiles* v. *C. & O. Ry. Co.*, 218 U.S. 71, and *Morgan* v. *Virginia*, 328 U.S. 373.

Simmons v. *Atlantic Greyhound Corporation*, 75 F. Supp. 166 (W.D. Va., 1947). District Judge Paul relied upon and followed the *DeCuir*, the *Chiles* and the *Morgan cases*.

Solomon v. *Pennsylvania R. Co.*, 79 F. Supp. 449 (S.D. N.Y., 1948). District Judge Goddard relied upon and followed the *Morgan case*, saying at page 450 it "reiterated the controlling effect of *Chiles* v. *Chesapeake & O. R. R.*, which held that a railroad could make reasonable rules and regulations as to segregation of colored and white passengers in interstate travel."

Interstate Commerce Commission Has Sanctioned Regulations of Carriers Requiring Separation of White and Negro Passengers With Equal Treatment of Each.

The Commission, in the very first year of its existence, sanctioned rules of common carriers requiring separation of white and Negro passengers. The first case before the Commission on this question was *Council* v. *Western & Atlantic R. R. Co.*, 1 I.C.C. 339 (1887), 1 Inters. Com. Rep. 638, where, at page 641, it was said:

> "Public sentiment, wherever the colored population is large, sanctions and requires this separation of races, and this was recognized by counsel representing both complainant and defendant at the hearing. We cannot, therefore, say that there is any undue prejudice or un-

> just preferences in recognizing and acting upon this general sentiment, provided it is done on fair and equal terms. This separation may be carried out on railroad trains without disadvantage to either race and with increased comfort to both."

The Commission has consistently so held through the *Hendson case* now before this Court, in *LeFore and Crishon* v. *Gulf, M. & O. R. Co.*, 262 I.C.C. 403 (1945), in *Barnett* v. *Texas & P. Ry.*, 263 I.C.C 171 (1945), and in *Mays* v. *Southern Railway Company*, 268 I.C.C. 352 (1947). These were dining-car cases. They cited with approval and followed the Commission's decision in the *Henderson case*. There are numerous cases between 1887 and 1947. A few are: *Heard* v. *Georgia Railroad Company*, 1 I.C.C. 428; *Heard* v. *Georgia Railroad*, 3 I.C.C. 111; *Edwards* v. *N. C. & St. L. Ry.*, 12 I.C.C. 247; *Evans* v. *C. & O. Ry. Co.*, 92 I.C.C. 713. See also *Crosby* v. *St. L.-S.F.Ry.Co.*, 112 I.C.C. 239.

The most recent dining-car case decided by the Commission is *Stamps and Powell* v. *Louisville & N. R. Co.*, 269 I.C.C. 789 (Divn 3, February 25, 1948). This decision is in harmony with the Commission's decisions in the *Henderson* (on further hearing) and *Mays cases*. It contains a complete review of the authorities upon which the Commission has relied in the disposition of these cases. Omitting authorities we quote the following from page 794:

> "The Commission, within a few months after its organization, expressed the conclusion that the separation of white and Negro passengers paying the same fare is not in violation of section 3 of the act if cars and conditions equal in all respects are furnished to both and the same care and protection of passengers is observed. *Council* v. *Western & Atlantic R. Co.*, 1 I.C.C. 339; *Heard* v. *Georgia R. Co.*, 1 I.C.C. 428. It has adhered to that conclusion consistently. Although the question has been constantly and persistently agitated before the public and the Congress for many years, the Congress has done nothing to indicate that it did not concur in the Commission's interpretation of the act."

This shows the continuity of decision on the part of the Interstate Commerce Commission.

The Long Continued and Uniform Practice of the Interstate Commerce Commission in Construing and Applying Section 3(1) of the Act is Entitled to Great Weight.

In these decisions the Commission has been construing and applying the provisions of Section 3(1) of the Act. In so far as pertinent here paragraph 1 of Section 3 reads today exactly as when enacted in the original Act to Regulate Commerce in 1887 (24 Stat. 380), see Appendix B, page 40. Thus we have an interpretation or application of the act to a practical factual situation confronting the railroads. The act has been amended many times; Section 3 itself several times. The interpretation or application adopted by the Commission is in keeping with the repeated decisions of this Court. The *DeCuir, Plessy, Chiles* and *Morgan* cases cover a span of seventy years.

In that background a familiar principle seems applicable. It is that long continued and uniform practice of the administrative agency is entitled to great weight and will not be disturbed except for cogent reasons. *Logan* v. *Davis* (1914), 233 U.S. 613, 627; *Kern River Co.* v. *United States* (1921), 257 U.S. 147, 154; *Swendig* v. *Washington Water Power Co.*, (1924), 265 U.S. 322, 331; *United States* v. *Minnesota*, (1926), 270 U.S. 181, 205; *Wisconsin* v. *Illinois* (1929), 278 U.S. 367, 413.

H. R. 22 was introduced on January 3, 1949, in the 81st Congress to amend Section 3(1) of the Interstate Commerce Act to prohibit the segregation of passengers on account of race or color. Submitted herewith as Appendix G. It has not become law. Its introduction is an indication that a new law would be needed if the existing, well-settled rule is to be changed.

Safety and Comfort of Passengers and Good Order on Trains Prompts Separation of the Races.

The separation of the races is based upon considerations of the safety, comfort, and general satisfaction of travelers of both races. The evidence in the case at bar clearly supports separation. Witness McClain, Assistant Vice President in charge of transportation of the defendant Railway, testified that the separation is due to the temperament of the people of the South through which the Railway operates. It is a matter of keeping peace and good order on the trains. The rule is to meet the feeling and attitude of the people of both races. It is not all a matter of white passengers resenting the presence of Negro passengers in space set aside exclusively for white passengers, for Mr. McClain showed there is resentment on the part of Negro passengers if whites occupy the space assigned exclusively for Negroes. As he said: "They even object to the white trainman having a seat in their compartment." (R. 167-169).

Mr. McClain pointed out that the Railway operates in the states South of the Ohio and Potomac rivers in which there are segregation laws (R.169). It is generally recognized that the laws adopted in the several states may be said to reflect the temperament and sentiment and views of the citizens of those states, so it is here a reference was made to existence of those laws and they were identified for convenient reference by an exhibit filed before the Commission, reproduced here for convenient reference as Appendix H, pages 45-46.

Appellant's attorney in cross-examining witness McClain asked as his first question:

> "(By Mr. Lawson) Is it fair to assume your testimony is this, the rule and policy of the Company is based on your desire to keep peace and good order among the races?"

To which Mr. McClain replied:

> "Absolutely." (R. 170).

Appellant conceded the right of the defendant railway to make reasonable rules and regulations for the conduct of its business and to protect its interest and that of the traveling public necessary to the performance of its duties. (R.23).

The Railway's Rule Accords White and Negro Passengers Equal Treatment in Dining Cars.

The space allotted to Negro passengers was shown in the record in the case at bar to be equal in kind to that allotted to white passengers and the quantity of the space so assigned was shown to be adequate.

For the purpose of showing that the space reserved exclusively for Negro passengers is adequate, defendant introduced through Witness Thomas, its Superintendent of Dining Cars, the results of two tests showing the relation between the number of white and Negro passengers served in its dining cars between Atlanta, Ga., and Washington, D. C. (Exs. 8-9, R. 225-247). The first of these tests covered the period May 14 to 24, inclusive, 1945. It shows that out of 37,615 meals 446, or 1.19 per cent, were served to Negro civilians, and 706, or 1.88 per cent, to Negro service people, making a total of 1,152, or 3.06 per cent, served to Negro passengers. The second test covered the period October 1 to 10, inclusive, 1946. It shows that out of a total of 20,789 meals 723, or 3.48 per cent, were served to Negro civilians, and 149, or 0.72 per cent, to Negro service people, making a total of 872, or 4.2 per cent, served to Negro passengers. (R.9).

Defendant's dining cars contain 48 seats (R. 129, 142) and, after installation of the stewards' offices, will contain 44 seats. Thus, under defendant's new regulations, approximately 8 per cent of the seat space is reserved exclusively to accommodate 4 per cent of its patrons (R.9). It is submitted that this is a most reasonable division of the available dining-car space. The Commission recited the defendant's evidence and concluded:

"* * * On the record before us, however, the conclusion is inescapable that defendant's rules now provide an equitable and reasonable division between the races of its available dining-car space." (269 I.C.C. 76, 77, R.9).

Witness McClain, Assistant Vice President of the Railway, testified very definitely, in response to a question by appellant's counsel, that the table set aside for exclusive use of Negro diners was just as comfortable and convenient as the tables set aside for the exclusive use of white persons (R. 214).

Witness McClain identified a series of photographs at the further hearing before the Commission which clearly show that the table assigned exclusively for the use of Negro passengers is identically the same kind and character as that set aside for white passengers. (Exs. 4, 5, 6, 7, R. 199-202, 224A, 224B, 224C, and 224D).

There is not a scintilla of evidence in the record in the case at bar to indicate any difference in quality of service furnished by the Railway to its passengers desiring dining car service whether they be white or Negro.

The Interstate Commerce Commission in the exercise of its appropriate jurisdiction has passed upon the factual situation bearing upon equality of service and made this definite finding:

"On the record before us, however, the conclusion is inescapable that defendant's rules now provide an equitable and reasonable division between the races of its available dining-car space." (R. 9.)

and

"We further find that the dining-car regulations established by defendant (Southern Railway) effective March 1, 1946, and currently in force, are not shown to be in violation of section 3, or of any other provision of the act. An order for the future is not necessary. The complaint will be dismissed." (R. 10.)

The three-judge District Court has affirmed the findings of the Commission.

The Arguments in Appellant's Brief Fail to Show Error in the Decision of the District Court.

Appellant argues that the railway's dining-car rule violates Section 1(4) of the Interstate Commerce Act (Brief, pp. 30-37). We submit appellant is in error. This paragraph imposes the duty on railroads to establish through routes and to make reasonable rules and regulations with respect to their operation. A through route has been defined as "an arrangement, express or implied, between connecting railroads for the continuous carriage of goods [or passengers] from the originating point on the line of one carrier to destination on the line of another." *St. Louis S. W. Ry. Co.* v. *United States*, 245 U. S. 136, 139, N. 2. (1917).

It is clear, we submit, that the provisions of Section 1(4) have nothing whatever to do with the railway's rule covering the seating of passengers in its dining cars.

It is argued by appellant that the railway's dining-car rule violates Section 3(1) of the Interstate Commerce Act (Brief, pp. 24-30), not because the accommodations furnished Negro passengers are not substantially equal to those furnished for white passengers but apparently because under the railway's rule Negro passengers are not permitted to occupy the tables reserved for white passengers.

Section 3(1) only requires that railroads furnish facilities which are substantially equal. That identical facilities are not required under Section 3(1) is clear from the decision in *Mitchell* v. *U. S.*, 313 U. S. 80, holding that "colored persons * * * must be furnished with accommodations equal in comforts and conveniences to those afforded to * * * white passengers" (p. 95).

The appellant erroneously contends that the Commission's failure to declare the railway's rule to be a violation

of the Interstate Commerce Act thereby violates the Fifth Amendment (Brief, pp. 38 *et seq*).

Unlike the Fourteenth Amendment, cases decided under which the appellant uses so freely in his argument, the "Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process". *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943).

Here no discriminatory legislation by Congress is involved. The segregation to which appellant objects results solely from a rule of the railway made by the railway to protect its passengers and itself.

Even in *Shelley* v. *Kraemer*, 334 U. S. 1 (1948), where this Court held that the equal protection clause of the Fourteenth Amendment prevented state courts from enforcing convenants in real estate deeds which restricted the ownership and use of property to certain races, this Court specifically stated that such agreements were not violative of the Fourteenth Amendment (p. 13). This Court also made it clear in *Shelley* v. *Kraemer* that its decision did not depend on the due process clause (p. 23).

Likewise, in *Hurd* v. *Hodge*, 334 U. S. 24 (1948), this Court in deciding a case of similar facts occuring in the District of Columbia declined to rest its decision on basis of the due process clause of the Fifth Amendment (p. 30). The case was decided under Section 1978 of the Revised Statutes and; as in the Shelley case, this Court took the position that the Statute "does not invalidate private restrictive agreements so long as the purposes of those agreements are achieved by the parties through voluntary adherence to the terms" (p. 31).

The railway did not ask the Interstate Commerce Commission to enforce its rule; the Commission has not undertaken to do so. This is simply a case in which the Commission in the exercise of its primary jurisdiction has determined that the rule does not interfere with the authority which Congress has assumed over interstate commerce by its enactment of Section 3(1) of the Interstate Commerce

Act. That Congress has not legislated against segregation as an interference with interstate commerce is evidenced by the fact that in recent years a number of bills to prohibit segregation in interstate commerce have been introduced, but Congress has consistently failed to enact such legislation;* and so despite the fact that the Interstate Commerce Act has been amended time and again.

Appellant, in an effort to get some support from *Shelley* v. *Kraemer*, vainly argues that the order of the Interstate Commerce Commission here involved is an order of the Federal government, and thus undertakes in error to invoke the Fifth Amendment clearly recognizing that the Fourteenth Amendment has no relation whatsoever to the case. We submit that by dismissing appellant's complaint the Interstate Commerce Commission has not entered an order which under any construction might be held to be an order of the Federal government. Appellant undertakes to support his argument by reference to the decision of the District Court wherein he quotes the Court as saying:

> "* * * Therefore, they [the carrier's rules] are to be treated, for the purposes of this complaint, as in effect the Commission's rules." (Brief, p. 46.)

Appellant's reference to page 74 of the transcript in support of that quotation will show that it was lifted from the opinion of the District Court of December 17, 1945, in the first case, Docket 2455 (R. 63). The decree (R. 79) set aside the Commission's order and remanded the case to the Commission for further proceedings. That decree finally terminated the proceedings in Docket 2455.

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* H. R. 8821, 75th Cong., 3d Sess., 83 Cong. Rec. 74; H. R. 182, 76th Cong., 1st Sess., 84 Cong Rec. 27; H. R. 112, 77th Cong., 1st Sess., 87 Cong. Rec. 13; H. R. 1925, 79th Cong., 1st Sess., 91 Cong. Rec. 749; H. R 280, 80th Cong., 1st Sess., 93 Cong. Rec. 47; H. R. 831, 81st Cong., 1st Sess., 95 Cong. Rec. 76.

Thereafter the case was reheard before the Commission (R. 196) and on further hearing, decided September 5, 1947 (R. 4), the Commission found:

> "• • • We further find that the dining car regulations established by defendant effective March 1, 1946, and currently in force, are not shown to be in violation of section 3 or of any other provision of the act. An order for the future is not necessary. The Complaint will be dismissed. (R. 10.)

On that date the Commission entered its order:

> "*It is ordered,* That the complaint in this proceeding be, and it is hereby, dismissed." (R. 12.)

On December 11, 1947, appellant again sued in the United States District Court for the District of Maryland where his action was docketed as No. 3829 to enjoin and set aside the order of the Interstate Commerce Commission entered after its further hearing (R. 1-4). In the opinion of the court in Docket No. 3829 filed September 25, 1948, Judge Coleman reviewed at some length the prior decision of the court in Docket 2455 and nowhere therein referred to the quoted sentence on which appellant here relies (R. 248-260). It is the decree entered in this second case which is before this Court on this appeal (R. 265).

It may fairly be said, therefore, that the court in its decision in the second case advisedly refrained from making the comment on which appellant here relies in support of his argument that the Commission's order is an order of the Federal government.

That the order of the Commission involved in this case is not an order of the Federal government is made quite clear by the decisions of this Court and the Interstate Commerce Commission. In *Arizona Grocery* v. *Atchison Ry.*, 284 U. S. 370 (1932), this Court held that where the Commission has prescribed rates for the future, which the carriers are required to observe, it may not later reverse its own requirement and, thereupon, award reparation on a

lower basis of rates. The opinion, with care, pointed out that rates prescribed by the Commission for the future can not be changed by the carrier, for the carrier is "bound to conform to the order of the Commission." The point here is that there is no requirement in the order of the Commission that the railway shall observe any specific rule. The railway may amend the rule of March 1, 1946, as occasion may require; indeed, it has been amended so as to substitute the word "Negroes" throughout for the words "colored persons" (R. 37). A contrary situation would have arisen had the Commission, in response to the prayer of appellant's complaint, prescribed a form of rule which the railway, under the Commission's order, would be required to observe. Nowhere in the order which appellant here seeks to enjoin will be found any compulsion on the carrier to observe the rule under consideration, or any other rule.

Following the decision in the *Arizona Grocery case, supra,* the carriers contended before the Interstate Commerce Commission that where it had found a rate assailed not to have been shown to be unreasonable, the rule of the *Arizona Grocery case* should apply so that the Commission could not award reparation out of such rates. The Commission uniformly held that such a rate was still a carrier-made rate and not a Commission-prescribed rate like the rate involved in the *Arizona Grocery case,* and thus declined to extend the principle. In *Alabama Rock Asphalt, Inc.* v. *Akron & B. B. R. Co.*, 203 I. C. C. 8 (1934), the Commission said:

> "* * * The principle announced in the *Arizona Grocery Co. case* has no application where the establishment of maximum reasonable rates for the future has not been required." (p. 12.)

In *Great Lakes Steel Corp.* v. *Alton R. Co.*, 237 I. C. C. 635 (1940), the Commission said:

> "Defendants contend that the rates assailed were prescribed as reasonable in *West Coast Lumbermen's*

Ass'n. v. *Akron, C. & Y. Ry. Co.*, 183 I. C. C. 191 and 192 I. C. C. 343. The rates assailed were not prescribed by the Commission but were carrier-made and were part of the adjustment that was merely found not unreasonable in that proceeding; therefore, the principle announced in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co., supra*, has no application here." (pp. 635-636.)

This Court has upheld the view of the Commission in the cases just cited. In *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671 (1943), Mr. Justice Jackson, speaking for the Court, stated at page 686:

"• • • The finding of the Commission that the proposed schedules 'are not shown to be otherwise unlawful' is, we think, to be similarly read. This form of finding has been held by the Commission not to constitute an approval or a prescription of the rates under suspension. Since the Commission refused to approve or prescribe them, they stand only as carrier-made rates which, under the Commission's decisions, leaves them open to possible recovery of reparations."

We submit that the Commission's finding that the dining-car rule established by the railway, effective March 1, 1946, and currently in force, was not shown to be in violation of Section 3, or any other provision of the Act, can not be held to be a "Commission-made rule" and by no stretch of the imagination an order or requirement of the Federal Government, hence appellant's effort in that connection to invoke the Fifth Amendment utterly fails.

CONCLUSION.

We submit the question presented for decision in this case is whether segregation of interstate passengers in dining cars of common carriers by railroad is forbidden by any provision of the Federal Constitution, the Interstate Commerce Act, or any other Act of Congress, so long as there is equality of treatment accorded white and Negro

passengers desiring dining car service. The record before the Commission and before the District Court amply justifies our statement of the real question in issue. At the first hearing before the Interstate Commerce Commission appellant himself very frankly stated the real ground of his complaint to be that the railway failed to serve him in its dining car when there were vacant seats at tables reserved for white passengers or at tables for Negro passengers which were then partly occupied by white passengers. When asked why he did not accept the steward's offer to serve him at his seat in the Pullman car he answered:

> "Because I felt under the law I had a perfect right to eat in the dining car, if there were seats available at the tables." (R. 96.)

And he added:

> "I felt that I should have been served in the dining car, because there were vacancies, that there were not only seats at other tables, there were also seats at these two tables behind the drawn curtain. That is the basis for my complaint." (R. 104.)

When the case came on for further hearing before the Interstate Commerce Commission appellant's attorney stated:

> "Mr. Examiner, we have no testimony, no witnesses. There is no dispute I think about the facts and my understanding of the court's decree is that it is a matter of law and a matter of new or certainly different regulations so for that reason we don't have any testimony." (R. 198.)

Appellant testified on his own behalf; there was no other witness for appellant.

Throughout the course of this litigation, indeed, from the quotations from the record just made, it appears that under appellant's concept of his rights in the premises he was entitled to enter the dining car if and when he pleased

and demand service therein upon seating himself at any vacant seat at any table in the diner. Appellant's position inevitably leads to that assertion of right. Yet in the very teeth of it we find appellant's counsel stated to the Court, upon the second trial in the District Court:

> "We concede that the carriers have the right to make reasonable regulations." (R. 23.)

It must be perfectly obvious, and a matter of general knowledge, that dining cars can not possibly in every instance accompany a train throughout the entire length of its journey. Likewise, there must be some hours during which the different meals are to be served. Similarly, it is the duty of the dining car steward to seat passengers at the different tables as they enter the diner so as to facilitate their prompt service by the several waiters. And of equal importance it is the duty of the steward to supervise the conduct of the service in the diner so as to avoid friction and preserve order to the comfort of the passengers using the dining car facilities. The dining car service is, of necessity, carried on in a limited space upon a moving train. Without reasonable regulations, a satisfactory service would be impossible. In a word, there is no such thing as leaving to each individual passenger the right to exercise his own choice as to when he will be served or where he will be served. With these broad principles, briefly stated, in mind, the railway involved in this case has provided a rule separating white and Negro diners by assigning certain space to be occupied by the white passengers for the full duration of the meal and certain other space in the diner assigned to the use of Negro passengers for the full duration of the meal. Such separation is in the interest of harmony, peace and good order. The habits, temperament and feelings of the people throughout the southern states, through which this railway operates, are registered in the statutes of the southern states. By those statutes the southern people speak their views, customs, habits and

feelings. Failure on the part of this railway to recognize the practical situation with which it is confronted because of the temperament, views and habits of those people would be to invite discord, friction and strife. The reported authorities from the decisions of this Court, hereinabove set out, have uniformly upheld separation of white and Negro passengers in common carrier vehicles from 1877 to 1946. As late as 1946 this Court, in *Morgan* v. *Virginia* (328 U. S. 377), recognized the right—it might well be said the duty—of common carriers by rail to provide reasonable rules for such segregation. The principle so recognized likewise finds complete support in the so-called "School" cases and in the "Municipal Streets" cases—all cited in the foregoing brief.

Furthermore, the Interstate Commerce Commission was appealed to by this appellant to determine, in the exercise of its exclusive jurisdiction, whether or not the rule of the railway was in violation of Section 3(1) of the Interstate Commerce Act. The Commission determined on full hearing and consideration that the rule of the carrier was not in violation of the law. In reaching that conclusion it relied upon prior decisions of this Court and stressed the unbroken line of decisions wherein the Commission had dealt with the question of segregation. Despite the pendency of bills in Congress to amend the law so as to ban segregation in interstate commerce, the Congress has not passed such a law. It is not to be supposed that the Congress did not know of the uniform holding by the Ineterstate Commerce Commission from the very year of its creation to date to the effect that segregation, equal facilities being provided, is not a violation of the law. And we might add that the Congress is certainly presumed to have known the decisions of this Court ever since the year 1877 sanctioning such rules and regulations by carriers as violative of no provision of the Constitution or any Act of Congress. If appellant's position is correct, it means that this Court, the lower Federal Courts, the Interstate Commerce Com-

mission, and Congress have all been wrong these many years. The Constitution and the statutes appellant here invokes have been in effect throughout all those years. What, may we ask, has happened to change their meaning patiently and carefully spelled out over the years? If appellant is right, why should bills be introduced in Congress to bring about the very end he here asserts is his right? To ask these questions is to answer them. There is but one answer—the position appellant takes in the case at bar is in error.

We respectfully submit the decision of the District Court should be affirmed.

SIDNEY S. ALDERMAN,
ARTHUR J. DIXON,
CHARLES CLARK,
Attorneys for Appellee,
Southern Railway Company.

APPENDIX A

CHRONOLOGICAL HISTORY

May 17, 1942. Incident giving rise to this litigation.

I. C. C. Docket No. 28895.

Oct. 10, 1942. Complaint filed (R. 80-83).
Feb. 24, 1943. Hearing (R. 86-183).
May 13, 1944. Decision, 258 I. C. C. 413 (R. 184-195).
Sep. 18, 1944. Rehearing denied (R. 195).

No. 2445, U. S. Dist. Court for Dist. of Maryland, Henderson v. U. S., I. C. C., So. Ry. Co. intervener.

Jan. 26, 1945. Suit filed (R. 53-58).
Sep. 24, 1945. Tried before District Court (R. 63).
Dec. 17, 1945. Opinion, 63 F. Supp. 906 (R. 63-79).
Feb. 18, 1946. Decree (R. 79-80).

I. C. C. Docket No. 28895 Reopened.

Oct. 15, 1946. Reheard (R. 196-247).
Sep. 5, 1947. Decision, 269 I. C. C. 73 (R. 4-11).

No. 3829, U. S. Dist. Court for the Dist. of Maryland, Henderson v. U. S. and I. C. C.; Sou. Ry. Co. intervener.

Dec. 11, 1947. Suit filed (R. 1-4).
June 4, 1948. Tried in District Court (R. 17-53).
Sep. 25, 1948. Opinion, 80 F. Supp. 32 (R. 248-260).
Oct. 28, 1948. Decree (R. 265).
Nov. 17, 1948. Appeal allowed (R. 269).

APPENDIX B

49 U.S.C. Sec. 3, par. 1*

"(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or *cause* any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, *association*, locality, *port, port district, gateway, transit point, region, district, territory,* or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, *association,* locality, *port, port district, gateway, transit point, region, district, territory,* or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided however, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.*"

CHAPTER 3.—CIVIL RIGHTS**

8 U.S.C., Section 41

"§ 41. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. R.S. § 1977."

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* Original Section 3, 24 Stat. 380 as amended. Italics indicate amendments of August 15, 1935, 49 Stat. 607, and September 18, 1940, 54 Stat. 902.

** Allegations in paragraphs VI and VII of Complaint (R. 82) were withdrawn at first hearing before Interstate Commerce Commission (R. 88-90).

8 U.S.C., Section 43

"§ 43. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. § 1979."

CONSTITUTION OF THE UNITED STATES*

Art. 4, § 2, cl. 1

"Section 2. Privileges and Immunities.

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

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* Allegations in paragraph IX of Complaint (R. 82) were withdrawn at first hearing before Interstate Commerce Commission (R. 88-90).

APPENDIX C

(R. 66, 186)

SOUTHERN RAILWAY SYSTEM

Dining Car Regulations

July 3, 1941.

Meals should be served to passengers of different races at separate times. If passengers of one race desire meals while passengers of a different race are being served in the dining car, such meals will be served in the room or seat occupied by the passenger without extra charge. If the dining car is equipped with curtains so that it can be divided into separate compartments, meals may be served to passengers of different races at the same time in the compartments set aside for them.

APPENDIX D

(R. 66-67, 186)

August 6, 1942.

Effective at once please be governed by the following with respect to the race separation curtains in dining cars:

Before starting each meal pull the curtains to service position and place a "Reserved" card on each of the two tables behind the curtains.

These tables are not to be used by white passengers until all other seats in the car have been taken, then, if no colored passengers present themselves for meals, the curtain should be pushed back, cards removed and white passengers served at those tables.

After the tables are occupied by white passengers then should colored passengers present themselves they should be advised that they will be served just as soon as those compartments are vacated.

"Reserved" cards are being supplied you.

RESERVED

("Reserved Card")

APPENDIX E

(R. 7-8,223,252)

Washington, D. C., February 19, 1946.

Transportation Department Circular No. 142.

Cancelling Instructions on this subject dated July 3, 1941, and August 6, 1942.

SUBJECT: SEGREGATION OF WHITE AND COLORED PASSENGERS IN DINING CARS.

To: Passenger Conductors and
Dining Car Stewards.

Consistent with experience in respect to the ratio between the number of white and colored passengers who ordinarily apply for service in available diner space, equal but separate accommodations shall be provided for white and colored passengers by partitioning diners and the allotment of space, in accordance with the rules, as follows:

(1) That one of the two tables at Station No. 1 located to the left side of the aisle facing the buffet, seating four persons, shall be reserved exclusively for colored passengers, and the other tables in the diner shall be reserved exclusively for white passengers.

(2) Before starting each meal, draw the partition curtain separating the table in Station No. 1, described above, from the table on that side of the aisle in Station No.2, the curtain to remain so drawn for the duration of the meal.

(3) A "Reserve" card shall be kept in place on the left-hand table in Station No. 1, described above, at all times during the meal except when such table is occupied as provided in these rules.

(4) These rules become effective March 1, 1946.

APPENDIX F

(R. 179-180)

Rules of the Operating Dept.

Effective August 1, 1923

Conductors:

Rule 1136. They will report for duty at the appointed time and see that their trainmen are on hand. They will have charge of the trains to which they are assigned and of all persons employed thereon. They are responsible for the safe and proper management of such trains, for the protection and care of passengers and property, for performance of duty by the train employes, and for the observance and enforcement of all rules and instructions. They must report all violations of rules and neglect of duty by the train employes to the superintendent or train master.

Rule 1138. They must require members of their crew to be familiar with their duties, and must instruct them, if necessary, in the proper performance of their work and caution them as to its risks.

Rule 1191. They must contribute to the comfort of passengers and give attention to those who are unattended, or those who are ill, infirm, inexperienced or otherwise unable to care for themselves.

Rule 1196. They must require passengers to occupy the cars or the space designated for them and not allow them to occupy places where their safety would be endangered.

Rule 1200. They must not allow drunken or disorderly persons to board the trains, nor allow improper language or disorderly conduct in the cars.

Rule 1201. These regulations must be enforced courteously and quietly but if not observed, the conductor must remove the offender from the train.

APPENDIX G

81st CONGRESS

H. R. 22

IN THE HOUSE OF REPRESENTATIVES

January 3, 1949

MR. POWELL introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce.

A BILL

To amend the Interstate Commerce Act (U.S.C., title 49, sec. 3 (1)), so as to prohibit the segregation of passengers on account of race or color.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Interstate Commerce Act (U. S. C., title 49, sec. 3 (1)), as amended, be, and the same is hereby, further amended by adding after the period which follows the word "description" the following sentences: "It shall be unlawful to segregate passengers traveling on any instrumentality or facility of carriage, or using any terminal facility, subject to this Act on account of such passengers' race or color. Any such segregation or attempt to segregate by any person or persons subject to this Act shall subject such person or persons to the penalties herinafter provided for violation of this Act."

APPENDIX H.

(R. 169-176)

February 25, 1943.

Elmer W. Henderson v. Southern Railway Co.,

I.C.C. Docket No. 28895.

Mr. W. P. Bartel, Secretary
Interstate Commerce Commission,
Washington, D. C.

Dear Sir:

In conformity with permission granted by Examiner upon the hearing of this case on yesterday, we submit for

the record the following references to state laws respecting the handling of passengers of different races:

Code of Alabama, 1940; Title 48-196, et seq.
Florida Statutes, 1941; Section 352.03, et seq.
Code of Georgia, 1933; Section 18-205, et seq.
(Ann. Code of Georgia, 1936; Section 18-205, et seq.)
Dart's Louisiana General Statutes, 1939; Section 8130, et seq.
Mississippi Code, 1930 (1942); Section 6132 (2351,7784), et seq.
Kentucky Revised statutes, 1942(1943); Section 276.440, et seq.
Code of Laws of South Carolina, 1942; Section 8396, et seq.
North Carolina Code of 1939; Section 3494, et seq.
(General Statutes of North Carolina, 1943; Section 60-94, et seq.)
Williams Tennessee Code of 1934; Section 5518, et seq.
Code of Virginia; (1942), Section 3962 et seq., and Section 4007.

And, in respect of conductors' police powers as follows:
Code of Alabama, 1940; Title 48-198.
Florida Statutes, 1941; Section 352.02.
Code of Georgia, 1933; Section 27-213 also Section 18-207.
(Ann. Code of Georgia, 1936; Section 18-205, et seq.)
North Carolina Code of 1939; Section 3483.
(General Statutes of North Carolina, 1943; Section 60-82.)
Code of Laws of South Carolina, 1942; Section 8420.
Code of Virginia; Section 3944.

Yours very truly,

Charles Clark.
A. J. Dixon.
Attorneys for Defendant.

Copy to—

Mr. Horace W. Johnson, Examiner, Interstate Commerce Commission, Washington, D. C.
Mr. Belford V. Lawson, Jr., 2001 11th St. N.W., Washington, D. C.